

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 309
5631949

BETWEEN ANJULA REDDY
Applicant

AND COUNTIES MANUKAU
DISTRICT HEALTH BOARD
Respondent

Member of Authority: Robin Arthur

Representatives: Edwin Sheppard, Counsel for the Applicant
Michael McFadden, Counsel for the Respondent

Investigation: On the papers

Submissions: 11 August 2016 from the Applicant

Determination: 12 September 2016

DETERMINATION OF THE AUTHORITY

- A. The application by Anjula Reddy to ‘set aside’ a settlement agreement, made between her and Counties Manukau District Health Board and certified under s 149 of the Employment Relations Act 2000 on 2 October 2015, is declined.**
- B. Costs are reserved.**

Employment Relationship Problem

[1] On 2 October 2015 Anjula Reddy and Counties Manukau District Health Board (CMDHB) attended mediation and settled an employment relationship problem on terms recorded in an agreement which was then certified by the Ministry of Business mediator under s 149 of the Employment Relations Act 2000 (the Act).

[2] By an application lodged on 23 June 2016 Ms Reddy asked the Authority to set aside the certified settlement agreement and “under exceptional circumstances reinvestigate the matter thoroughly”.

[3] Ms Reddy considered she was unfairly pressured during mediation into making an agreement on a day when she was under the influence of medication for depression and to control ongoing pain resulting from an ankle injury. She submitted the agreement should be cancelled because it was made while she had diminished capacity or she should be awarded compensation for an unfair bargain imposed on her that day.

The Authority's investigation

[4] By consent of the parties Ms Reddy's application has been determined 'on the papers'. The papers comprised her statement of problem, CMDHB's statement in reply, and submissions lodged by Ms Reddy's counsel along with a bundle of additional documents. With her statement of problem Ms Reddy had lodged a number of documents about an ankle injury she suffered on 28 June 2014 and the treatment she received for it. The additional documents were correspondence about Ms Reddy's health and ongoing pain from her injury, CMDHB's notice to the Nursing Council of the termination of Ms Reddy's employment, and a determination of a Professional Conduct Committee of the Nursing Council.

[5] CMDHB was not asked to lodge submissions in reply as, for reasons set out in this determination, on the basis of Ms Reddy's submissions alone there was no real prospect her application could succeed. Those submissions, from counsel instructed after Ms Reddy had lodged her application, were thoughtful, thorough and well-made but faced some legal hurdles that could not be crossed on what was apparent about the facts of her case.

[6] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Relevant background

[7] Ms Reddy was employed as a registered nurse by CMDHB from 9 September 2009 until 9 December 2014. On 16 July 2015 her legal representative at that time lodged a statement of problem in the Authority. After CMDHB lodged a statement in

reply the parties were directed to mediation under s 159 of the Act. The parties attended mediation on 2 October 2015 where terms of settlement was agreed, recorded and certified by a mediator under s 149 of the Act. Ms Reddy's legal representative advised the Authority on 8 October 2015 that the matter was settled and Ms Reddy withdrew her claim.

[8] This determination has made limited reference to the details of the employment relationship problem resolved in mediation on 2 October 2015. The agreement made there, which remains in force, included a term stating its terms "remain, so far as the law allows, confidential to the parties and their representatives". For the purposes of this determination, however, it was necessary to disclose three of those terms. The parties agreed they would refer to the end of their employment relationship as being "by mutual agreement". They also agreed CMDHB would advise the Nursing Council that the employment ended on that basis. And, thirdly, they agreed that the terms of their agreement were made in "full and final settlement of all matters between [Ms Reddy] and [CMDHB] arising out of their employment relationship".

[9] Since that agreement was made a Professional Conduct Committee of the Nursing Council has completed an inquiry into some aspects of Ms Reddy's practice as a nurse. It do so after receiving a notification CMDHB was required to made under its statutory reporting responsibilities.¹ After a hearing in early March the committee issued a determination dated 21 March 2016. Ms Reddy's application to the Authority described the committee as having found her "not guilty" of an accusation made about her.

[10] It was not an accurate description of the nature of the outcome stated in the committee's determination. The committee did decide no further disciplinary action should be taken but noted evidence Ms Reddy had made a medication error, failed to complete an incident report and failed to inform a patient's nurse of the error. It decided the incident was not serious enough to refer professional misconduct charges to the Health Practitioners Disciplinary Tribunal but recommended the Nursing Council impose conditions requiring professional supervision by an approved supervisor when Ms Reddy returned to practice. It said Ms Reddy had failed to show

¹ Health Practitioners Competence Assurance Act 2003, s 34(3).

she understood the reasons for the concerns raised in the investigation and “she continued in her failure to acknowledge and take responsibility for her error”.

[11] Ms Reddy’s statement of problem said she wrote to CMDHB after receiving the committee’s finding and asked it to engage in further mediation with her but CMDHB refused her request.

[12] CMDHB’s position, as set out in its statement in reply, rested on two points.

[13] Firstly, its settlement agreement with Ms Reddy included an express term that the agreement was made in full and final resolution of all matters between it and her.

[14] Secondly, the process of having the agreement certified by the mediator under s 149 of the Act required the parties to confirm they understood that, once signed by them and certified by the mediator, the following provisions of s 149(3) applied:

- (a) those terms are final and binding on, and enforceable by, the parties; and
- (ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and
- (b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

[15] On that basis CMDHB said Ms Reddy was bound by the term on finality, could not have the agreement cancelled and could not bring its terms before the Authority for action or review. It noted the mediation was conducted by “an experienced and respected mediator” and Ms Reddy had access to independent advice at the time because she attended the mediation with a representative who was an experienced lawyer. It asked the Authority to dismiss her application.

The issues

[16] From Ms Reddy’s statement of problem and her counsel’s submissions in support of her application the following issues arose for determination:

- (i) Could evidence of what was said and done in the mediation be considered?
- (ii) Could the settlement agreement be set aside as an “unfair bargain” under s 68 of the Act?
- (iii) Could a settlement agreement certified under s 149 of the Act be set aside due to diminished capacity of a party to make and affirm such an agreement?

- (iv) If so, was there sufficient evidence to warrant further investigation of Ms Reddy's application?

Conduct of the mediation

[17] In her application Ms Reddy made a number of allegations about what happened in mediation on 2 October 2015. She described feeling "rushed" by the mediator and being "pushed" to accept the agreement. She said she asked for, but was denied, more time to decide whether or not to accept it. Her present counsel did not attempt to pursue that argument and submitted events in mediation were not essential to Ms Reddy's case, which rested on a different legal argument. However, as Ms Reddy had raised the issue, two points needed to be made about it.

[18] Firstly, what was said for the purposes of the mediation on 2 October 2015 was confidential.² Evidence of it was not admissible in the Authority without the consent of both parties.³ For public policy reasons some exceptions apply to those statutory rules but are limited to circumstances such as where serious criminal conduct has occurred during mediation.⁴

[19] Secondly, even if Ms Reddy's assertions that the conduct of the mediation was unsatisfactory were admissible evidence, what she said was insufficient to warrant further inquiry. All parties will feel some pressure to resolve matters in mediation. An experienced legal advisor accompanied Ms Reddy at the mediation. In that context, it was unlikely the mediator's conduct was excessive or Ms Reddy's will was overborne to the extent she has asserted many months later. This conclusion has been reached bearing in mind a need for caution noted by the Employment Court in *AFT v BCM* about acting on assumptions generated by a "good general institutional reputation" of Ministry of Business mediators.⁵ Ms Reddy's access to professional advice and representation at the mediation was an important protection and distinction from the circumstances described by the Court in the *AFT* case.⁶

[20] Section 152(2) of the Act allows for agreed terms of a 149 settlement agreement to be challenged or called into question on two grounds – one, that the

² Employment Relations Act 2000, s 148(1).

³ Employment Relations Act 2000, s 148(3).

⁴ *Jesudhass v Just Hotel Limited* [2007] NZCA 582 at [41].

⁵ [2015] NZEmpC 234 at [54]-[55].

⁶ At [50], [51] and [58].

mediator did not comply with the requirements for explaining the effect of settlement or, two, that the parties did not affirm their request for certification in the knowledge of the effect of such a settlement as being final, binding and not open to cancellation. In this case there was no evidence or suggestion of any such failure.

Could the agreement be set aside as an “unfair bargain” under s 68 of the Act?

[21] Ms Reddy, through counsel, submitted section 68 of the Act applied to settlement agreements regarding the end of an employment relationship. If that principle were accepted, Ms Reddy submitted that what was agreed on 2 October 2015 amounted to a significant variation to her terms of employment and her employment agreement. If that were so, she submitted the statutory protection against unfair bargaining would apply. This would enable the agreement to be cancelled or CMDHB to be ordered to pay compensation to her, if two circumstances were established as more likely than not to be true.

[22] The first of those circumstances concerned whether, at the time of entering the agreement, Ms Reddy was unable to understand its provisions or implications due to “diminished capacity” due to, for example, sickness, mental disability or emotional distress.

[23] The second of those circumstances concerned whether, at that time, CMDHB knew or should have known about Ms Reddy’s diminished capacity.

[24] However, for s 68 to apply, Ms Reddy would have to establish the settlement agreement was an employment agreement. It was an argument that failed for both factual and legal reasons.

[25] Ms Reddy’s employment by CMDHB ended on 9 December 2014. She submitted her employment agreement remained “a live document” because her employment had ended by an unjustifiable action of CMDHB and she sought reinstatement to her previous position on the terms stated in her employment agreement. It was correct that the statement of problem Ms Reddy lodged on 16 July 2015 had sought reinstatement but otherwise the proposition about a ‘live’ employment agreement was not sustainable as matter of fact and law. The employment was not ‘on foot’ by the time the parties met in mediation on 2 October 2015. Actions such as raising a personal grievance may relate to alleged breaches of

express or implied terms of a former employment agreement but those actions do not resurrect a ‘dead’ contract. As such its terms could not have been varied by the settlement agreement made ten months later.

[26] Ms Reddy also sought to rely on an Authority determination issued in 2007 which was said to confirm a settlement agreement could be a term or condition of an employment agreement.⁷ The proposition relied on a Court of Appeal decision in 1992 that found a settlement arrangement by which two employees terminated their employment relationship in exchange for a payment amounted to a variation of their employment agreement.⁸ But there was an important factual distinction in the circumstances considered by that Authority determination and the Court of Appeal decision – the workers in each instance were in employment relationships, with a ‘live’ employment agreement, at the time those settlement arrangements or agreements were made. In Ms Reddy’s case there was no live employment agreement to vary. And even if there were a ‘live’ agreement by the time that the parties met in mediation on 2 October 2015, a more recent Court of Appeal decision calls into question the basis on which the settlement agreement she and CMDHB made that day could be categorised as an employment agreement.

[27] In its decision in *J P Morgan Chase Bank NA v Lewis*, the Court of Appeal did not rule out the possibility that a settlement agreement could be considered to be a variation of an employment agreement but applied legal principles requiring an analysis of the common intention of the parties as to the effect of the terms of the particular agreement made.⁹ In the circumstances of that case the Court of Appeal refused to adopt an “artificial” description of a settlement agreement as a variation of an employment agreement. It concluded the settlement agreement in that case, about the terms on which employment was to end, was “to be regarded as a stand-alone agreement and not properly categorised whether in whole or part as an employment agreement”.¹⁰

[28] In Ms Reddy’s case it would be similarly artificial to categorise the terms in the settlement agreement made on 2 October 2015 about how the parties would describe the end of her employment as being a variation to the terms of a relationship

⁷ *Tuari v Sims Pacific Metals Limited* (ERA Christchurch CA 27/07, 23 March 2007) at [63].

⁸ *Department of Survey and Land Information v NZ Public Service Association* [1992] 1 ERNZ 851.

⁹ *J P Morgan Chase Bank NA v Lewis* [2015] NZCA 255 at [64] and [65].

¹⁰ At [85].

that ended nine months earlier. However Ms Reddy submitted the decision did not apply to her circumstances as the Court of Appeal did not touch on the application of s 68 of the Act, about unfair bargaining, on a settlement agreement.

[29] But that proposition about potential application of s 68 fell at the first hurdle, the categorisation of her settlement agreement as not being an employment agreement. The section applies only to “bargaining for an individual employment agreement”. Details of the contents of the settlement agreement already disclosed in this determination establish its terms did not provide for the end of her employment, rather they were about how it would be described (“by mutual agreement”) and some arrangements about subsequent actions (such as the notice to the Nursing Council). They were not variations to the terms of her employment, which had ended nine months earlier. On that basis, the settlement agreement was not an employment agreement. It could not ‘trigger’ the potential application of s 68. Its protections and remedies were not available to her.

[30] A further relevant point was that the settlement agreements in the two Court of Appeal decisions and one Authority determination referred to above were not agreements made and certified under s 149 of the Act. Section 149 agreements are by their statutory nature inherently different from a privately agreed employment agreement.

Can a certified agreement be set aside due to diminished capacity?

[31] While s 149(3) of the Act establishes a high statutory hurdle to setting aside a certified settlement agreement, the question is not entirely closed. In *AFT v BCM* the Employment Court accepted as arguable the proposition that a public policy exception may exist to the inviolability of mediation where a party alleges his or her psychological health, as a result of illness or treatment, was such that entering into the settlement agreement certified by the mediator was not an informed exercise of that party’s free will.¹¹ Where a party’s ability to comprehend significant events and her or his free will may have been adversely affected for medical reasons, and that person was vulnerable due to a lack of professional advice and representation, those exceptional circumstances may warrant disclosure and examination by the Authority

¹¹ *AFT v BCM*, above n 5, at [59].

or the Court of what happened in mediation.¹² In such circumstances the Court suggested settlement agreements under s 149 were “very difficult, but not necessarily impossible, to set aside” and arguably could be on the grounds of “medical incapacity”.¹³ Similar prospects have been accepted in other earlier cases.¹⁴

[32] However the Authority could not set aside a certified agreement on the basis of a mere assertion of medical incapacity. To do so would be to disregard the power of the prohibition on action and review declared by Parliament in s 149(3)(b) of the Act. It would also disregard the certification of a mediator, of which the Authority is entitled to take notice, that the parties had asked for certification of their agreement which was provided only after explaining its effect and the mediator being satisfied that the parties, at the time, had affirmed their request in light of that knowledge.

[33] Settlement agreements certified under s 149 are the means by which the overwhelming majority of such problems are officially resolved. If the simple say so of one party was sufficient to unpick the statutory closure provided in s 149(3), the primary pillar of the employment resolution system would become entirely unstable and unreliable.

[34] An application to set aside a settlement agreement could not reasonably proceed to investigation without some sound evidential basis and realistic prospect of establishing the allegations made. The remainder of this determination has considered whether Ms Reddy’s application was supported by such evidence.

Did Ms Reddy provide evidence sufficient to warrant further investigation?

[35] Ms Reddy submitted the agreement made and certified on 2 October 2015 should be set aside because she was unable to adequately understand its provisions or implications because her capacity was diminished by sickness, mental disability and emotional distress. She submitted CMDHB knew or should have known of her diminished capacity. She submitted a combination of drugs she was taking at the time to control ongoing pain due to her ankle injury and manage depression and stress

¹² At [58].

¹³ At [80].

¹⁴ *Lumsden v Sky City Management* [2015] NZEmpC 225 at [42]: “not ... an impermeable barrier”; *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [20] and *Tinkler v Fugro PMS Pty Limited v Pavement Management Services Limited* [2012] NZEmpC 102 at [27]: “possible exception of duress on public policy grounds”.

meant her “capacity and level of functionality was severely diminished when the agreement was signed”.

[36] The medical records accompanying her application established that she reported suffering ongoing pain, stress and anxiety and was prescribed various drugs to control or manage her physical, mental and emotional difficulties. They do not establish what amounts or combination of those medications she was actually taking.

[37] Whether her capacity that day was truly so diminished that she lacked the free will to make such an agreement, and could not comprehend its significance, would have to be determined on the basis of independent medical assessment of what was likely to have been her actual condition that day. Letters from two doctors provided with her submissions did not endorse Ms Reddy’s proposition of diminished capacity.

[38] A note from her GP, dated 29 July 2016 and addressed to “whomsoever it may concern” gave this description of what Ms Reddy told him about having “lost her employment in 2014 due to an error she made at work”:

At the time she was under considerable stress and was treated with anti-depressant medicines and pain relief. She feels that she was unable to make appropriate and informed decision[s] about her work issues due to the above factors.

[39] It described Ms Reddy’s account and feelings but made no statement or comment in support of her allegation that her health issues and medication impaired her capacity to make the settlement agreement on 2 October 2015.

[40] The orthopaedic surgeon who had operated on Ms Reddy’s injured ankle on 11 March 2015, and had been involved in her care since then, also provided a letter written at Ms Reddy’s request and dated 4 August 2016. It began with this description:

Anjula has asked for a letter detailing problems that she had on the 2nd October 2015 and these relate to her judgement on that day. I understand she was involved in a[n] employment negotiation meeting on this day. At the time Anjula had significant pain, was on pain medication, suffering a significant amount of stress and felt under pressure during the meeting. Anjula feels that she was still recovering from surgery and the consequent R leg and back pain. Anjula is unhappy with the decision that she made that day. Her lawyer is writing for a dismissal of this decision so that she can re-discuss her dismissal from work.

[41] While the surgeon set out a careful and clear account of what he said Ms Reddy told him, the remainder of his letter was eloquently silent about the proposition that her capacity was too diminished to freely make the agreement she did that day.

[42] None of the other medical records provided with her application and submissions, read together with the two letters referred to above, established any real prospect Ms Reddy might persuasively argue it was more likely than not that she lacked sufficient capacity to make the agreement she did on 2 October 2015.

[43] Rather Ms Reddy's application, and the documentary evidence in support of it, established no more than what the Employment Court has called "settler's remorse".¹⁵ She may subsequently have wished she had done things differently at the time, but had not provided compelling evidence likely to establish she was too unwell or distressed to have the capacity to freely make the agreement she did that day.

[44] To allow Ms Reddy to proceed with her application would have been inconsistent with the requirements of s 149 of the Act, imposed an unfair burden on CMDHB which had been entitled to rely on the finality promised by the Act, and risked a substantial costs award against Ms Reddy if further investigation of her application proceeded to its more likely than not unsuccessful conclusion. Ms Reddy's application is declined and dismissed.

Costs

[45] Costs are reserved. They may likely not be an issue as, while CMDHB did lodge a statement in reply, it was not required to prepare and lodge a submission on the issues canvassed in this determination. However if there is any issue of costs between the parties, they are encouraged to resolve it between themselves.

[46] If they are not able to do so and an Authority determination on costs is needed CMDHB may lodge, and then should serve, a memorandum on costs. From the date of service of that memorandum Ms Reddy would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

¹⁵ *Roy v Board of Trustees of Tamaki College* [2016] NZEmpC 20 at [173] citing *Hildred v Strong* [2007] NZCA 475 at [46].

[47] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁶

Robin Arthur
Member of the Employment Relations Authority

¹⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].